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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 349

FLOYD L. HOFFMAN,
Petitioner,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

FLOYD L. HOFFMAN, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States entered in the above-entitled cause on May 13, 1966.

OPINIONS AND ORDERS BELOW

(a) The opinion or the original hearing is reported at 175 Ct. Cls. 457, copy of opinion is appended hereto as Exhibit A.

(b) Order of Court of Claims, dated October 28, 1966, allowing in part petitioner's motion for rehearing.

(c) Order of Court of Claims, dated February 10, 1967, denying petitioner's motion for rehearing.

JURISDICTION

The final judgment of the Court of Claims dismissing the petition was entered on February 10, 1967. Petitioner's motion for rehearing was denied on February 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

(1) Did petitioner submit sufficient evidence to justify a hearing before the Air Force Board for the Correction of Military Records to meet the standard under the agency regulation (AFR 31-3, Section 9) to require a hearing before that agency Board and, if he did, was the Board guilty of arbitrary and capricious action in denying the application without a hearing?

(2) If petitioner submitted evidence sufficient to indicate probable and material error or injustice, was not the Court of Claims required to determine whether or not petitioner met the criteria for disability retirement under the pertinent statutes and regulations by reason of physical disability?

(3) Should not a writ of certiorari be issued by the Supreme Court of the United States in this case and review the action of the administrative board of the United States Air Force and the United States Court of Claims and direct the entry of a judgment for disability retired pay?

STATUTES AND REGULATIONS

The applicable statutes and regulations are set out in the Appendix.

STATEMENT OF THE CASE

(a) After prior military service, petitioner served on active duty as a commissioned officer in the United States

Air Force from October 12, 1948 to April 29, 1952. Petitioner did not have any record of serious respiratory disturbance upon entering on active duty in 1948; he was normal in all respects and he was found to be "qualified and acceptable for extended active duty on a general military service status". Petitioner had no problems of any consequence with his health prior to December 1950.

(b) Statement of petitioner's health problems after December 1950;

(1) April 1951: Serious penicillin reaction after receiving several penicillin injections for an upper respiratory infection. Petitioner was hospitalized for more than a week.

(2) Petitioner's respiratory troubles steadily mounted after May 1951, he experienced difficulty in breathing, hoarseness, sore throat and loss of voice. Petitioner required frequent medical treatment all during 1951; he continued to perform his military duties.

(3) February 1952 petitioner suffered a severe attack diagnosed as "acute viral influenza and pneumonitis and probably acute exacerbation of chronic bronchial asthma".

(4) 1952-1958: After petitioner's separation from active service: Petitioner's asthmatic condition became progressively worse; 1952 and 1954—two severe attacks which disabled him for about a week on each occasion; 1954-1958 recurring severe asthmatic attacks.

(5) In 1958, petitioner's condition having worsened from asthma to chronic asthma and emphysema (an incurable disease), forced his disability retirement.

(6) Dr. Nesbitt testified at the trial as an expert witness; he expressed the opinion that plaintiff was physically unfit for full military duty at the time of his release from active military service in April 1952.

The Government did *not* present any expert testimony to rebut Dr. Nesbitt's opinion.

(c) (1) In April 1952, petitioner was released from active duty, not by reason of disability; he was given a physical examination for the purpose of separation and on the basis of information furnished by petitioner episodes of asthma attacks were noted on petitioner's record. *Medical records relating to petitioner's severe attacks during 1951 were not available to the medical officer who made the separation examination.*

(2) Petitioner was little aware of his true physical condition at the time of his separation examination and he did not realize the seriousness of his condition until 1954.

(d) On December 12, 1958 (after petitioner's disability retirement from civil service) he petitioned the Air Force Board for the Correction of Military Records for physical disability retirement as of April 29, 1952. In support of that application, petitioner submitted considerable documentary evidence concerning his physical health and illnesses, including (a) examination reports of the Guam attack; (b) the report of his separation physical; (c) Government medical records and physical examination reports relating to petitioner's commission as an officer in the Reserves, and to attacks he suffered while employed as a civilian in the Federal Civil Service during the periods between 1952 and 1958; (d) VA records which included statements by civilian physicians; (e) written statements from officers and lay individuals who had personal knowledge of petitioner's physical appearance and condition before and after separation from active duty; (f) personnel records; and (g) other documentary evidence.

The Correction Board, after receiving advice from the Surgeon General, denied *petitioner a formal hearing be-*

fore the Board on the ground that he had failed to submit sufficient evidence to establish a showing of "probable error or injustice".

Petitioner alleged to the Court of Claims that the action by the Correction Board in failing to correct his records to show service-connected disability at the time of retirement, was arbitrary and capricious.

(e) On May 13, 1966, the Court of Claims decided petitioner was not entitled to recover, and the petition was dismissed.

In an order dated October 28, 1966, the Court of Claims granted petitioner's motion for rehearing on the ground that:

> At the time of the decision and opinion in the case, the Court was of the view that the Trial Commissioner had considered post-separation evidence in finding plaintiff fit upon separation to perform his duties . . . . The motion for rehearing raises a substantial question as to the correctness of this assumption.

The Court remanded the case to the Trial Commissioner

> for the submission of a memorandum to the Court as to whether and, if so, to what extent the Commissioner considered plaintiff's post-discharge or post-separation medical history in finding plaintiff fit to perform the duties of his grade or rank at the time of separation.

On February 10, 1967, petitioner's motion for rehearing was denied.

ARGUMENT

A.

The Court Erred as a Matter of Law in Ruling That in Determining Incapacity the Inquiry Must Be Limited to the Evidence Then Existing and Available to the Examining Physicians at the Time of Release

The Court of Claims findings establish, that:

> The unrebutted evidence of record clearly shows that plaintiff's history of respiratory infections and illnesses dates back to about December 1950; that during the period between December 1950 or January 1951, and April 1951, while he was in Tokyo, Japan, plaintiff was given a series of penicillin injections, as well as other medications and treatment, for his respiratory infections and illnesses; that in April 1951, while on Guam, plaintiff violently reacted to penicillin injections given to him in Japan, which precipitated an asthma attack and triggered an intrinsic asthma condition that progressed from that date forward to the point he developed bronchial asthma, chronic bronchitis, and emphysema, a progressive, disabling and incurable disease . . . [Fdg. 32, Slip Op. pp. 34-35]

Therefore, the Court concluded that:

> There was a direct causal connection between the respiratory illnesses and "episode of asthmatic bronchitis" suffered by plaintiff in 1950 and 1951, while he was on active duty in Japan, including the adverse reaction he had to penicillin injections given to him in Japan which resulted in the attack that occurred on Guam in April 1951, and plaintiff's present physical condition. Plaintiff did not have any record of serious respiratory disturbance upon entering on active duty in 1948, and it cannot be seriously questioned that his disability is service-connected. [Fdg. 33(a) Slip Op. p. 35]

In support of the contention that at the time of separation his asthmatic condition had progressed to the state that made him unfit for general service, petitioner presented extensive medical testimony. Of particular importance, petitioner showed that just two months prior to his separation he had suffered a severe asthmatic attack which was diagnosed as "acute excerbation of chronic bronchial asthma". (Fdg. 6, Slip Op. pp. 12-13). In addition, he presented testimony by a physician (Dr. Nesbitt) who treated petitioner subsequent to his release. Dr. Nesbitt expressed the opinion, based on petitioner's entire medical history, that petitioner was permanently disabled and unfit for military duty at the time of his separation. (Fdg. 27, Slip Op. pp. 30-31). The Government did *not* present any expert testimony to rebut Dr. Nesbitt's opinion. It merely relied on petitioner's military medical history. The only evidence contained in the record which would indicate that petitioner was fit was the determination by a physician who examined petitioner incident to his separation. The record is clear however that this physician was not aware of petitioner's asthmatic attack which occurred just two months prior to his separation, nor did he have petitioner's medical records with respect to petitioner's prior attacks in Tokyo and Guam.

Nevertheless, the Court determined that petitioner was not permanently disabled and was fit for general service at the time of his release in 1952 because:

> the record does not support the opinion expressed by Dr. Nesbitt . . . to the effect that *there was a sufficient record in 1952*, by way of history from the plaintiff and documentary medical history, to have enabled him to reach the decision that plaintiff was physically disabled and unfit for full military duty at the time of his separation from active duty with the Air Force on April 29, 1952, because of bronchial asthma. [Fdg. 31(c) Slip Op. p. 34]

The Court rejected Dr. Nesbitt's unrebutted opinion on the grounds that:

> It is quite clear from Dr. Nesbitt's testimony that he made a *retrospective diagnosis* of plaintiff's condition at the time of his separation based upon medical history furnished by plaintiff relating to periods prior and *subsequent to his separation*, reports of some of the physical examinations given to plaintiff and medical records covering plaintiff's illnesses, attacks and treatments that relate to periods subsequent to his separation *which were not before medical authorities who examined plaintiff on April 21, 1952*, and Dr. Nesbitt's knowledge of plaintiff's condition gained through medical examinations and treatments afforded plaintiff by Dr. Nesbitt, or his associate, during the period from March 1957 to January 1963. [Fdg. 31(c). Slip Op. p. 34; emphasis supplied].

The Court predicated its ultimate conclusion that petitioner was not permanently disabled and fit for general service at the time of his separation in 1952 on the fact that:

> the record in this case does not disclose that official medical records and reports relating to illnesses suffered by, and treatments afforded, plaintiff during 1950 and 1951, while he was on active duty in Japan, particularly the attack that occurred on Guam in April 1951, were available to the medical officer and authorities who examined and approved plaintiff for separation, or that plaintiff advised the examining medical officer or authority of the attack he suffered in late February 1952, while enroute to Wright-Patterson AFB, Dayton, Ohio . . . that plaintiff admittedly did not realize the seriousness of his condition at the time of his separation examination and did not become aware of his true condition until about 1954; and that plaintiff's bronchial asthma condition apparently was in a state of remission when he was examined for the purpose of separation. Considering

> the *foregoing facts*, it cannot be affirmatively found, the testimony of Dr. Nesbitt to the contrary notwithstanding . . . that there was *sufficient evidence, by way of history furnished by plaintiff and official documentary medical history, available at the time of plaintiff's separation examination to justify a determination by military medical authorities that plaintiff then was physically unfit to perform full military duties.* [Fdg. 31(b) Slip Op. p. 33-34; emphasis supplied]

Thus, it is clear that the Court's decision is premised on the proposition that not only medical evidence subsequent to petitioner's release from active service could not be considered in determining petitioner's incapacity at the time of release, but also petitioner had an affirmative duty to make available his entire military medical history to the examining physician. The Court has, in effect, ruled that in determining whether a person was permanently incapacitated at the time of release and unfit for general service, the inquiry must be limited to the evidence then existing *and available* to the physicians examining a serviceman incident to his separation and that all subsequent evidence must be excluded from consideration. This standard of proof, we submit, is contrary to prior decisions of the Court of Claims and in addition prevents a plaintiff before the Court of Claims from establishing his true condition at the time of release. This is especially true in those situations, as it was the case here, where petitioner's condition was latent or quiescent at the time of release and flared up thereafter.

It is axiomatic that Congress in establishing the Correction Boards[1] for the Military Departments did not intend to limit the Board's inquiry (in determining whether to change "*any* military record . . . to correct an error or remove an injustice") to the military records them-

[1] 10 U.S.C. § 1552 (1958 Ed.).

selves. Thus the Court of Claims in a long line of decisions has consistently held that subsequent medical history is always material and is frequently vital in a determination of the nature and extent of disability at the time of release. *Powers* v. *United States*, Ct.Cl. No. 80-60 decided June 10, 1966 Slip Op. pp. 10-12; *Walters* v. *United States*, —— Ct.Cl. ——, 358 F.2d 957, 961 (1966); *Farrar* v. *United States*, 173 Ct.Cl. 1008, 358 F.2d 965 (1965); *Smith* v. *United States*, 168 Ct.Cl. 545, 553 (1964); *Woodward* v. *United States*, 167 Ct.Cl. 306 (1964); *Grubin* v. *United States*, 166 Ct.Cl. 272, 277, 333 F.2d 861, 863 (1964); *Harper* v. *United States*, 159 Ct. Cl. 135, 310 F.2d 405 (1962); *Patterson* v. *United States*, 141 Ct.Cl. 435 (1958); *Proper* v. *United States*, 139 Ct. Cl. 511 (1957). This is so because hearings before boards such as the Correction Board "are not contests; they are inquiries concerning disability. The purpose is to get at the truth of the matter . . . [and] [t]he medical history following the retirement will often be of great importance . . . [and] may . . . be highly pertinent to the inquiry." *Robertson* v. *Chambers*, 341 U.S. 37, 39 (1951). Thus, the crucial issue is not whether the examining physicians made a mistaken diagnosis based on the evidence before them, but rather whether subsequent medical history demonstrates the mistake and discloses the true nature and extent of petitioner's condition at the time of release. For as the Court of Claims recently stated:

> The test for recovery, however, does not rest solely on the reasonableness of the action of the examining physicians at the time of release from active duty. The petitioner may prevail if he can show that if the complete facts concerning his condition had been known at that time he would have been entitled to retirement by reason of physical disqualifications under the pertinent laws and regulations. [Citing *Harper*, *Farrar* and *Stone*]. To this end, reference must of necessity be made to his *subsequent medical*

> *history* insofar as it sheds light on the nature of his physical condition while in Service. Evidence of *progressive deterioration* and later *discovered symptoms* and disabilities may be decisive if it can establish that plaintiff's incapacity while in service was substantially more serious than suspected and that previous diagnoses were inadequate or incorrect. [*Walters* v. *United States*, 175 Ct.Cl. 215, 358 F.2d 957, 962-64 (1966); emphasis supplied].

This is exactly what petitioner sought to establish through the unrebutted testimony of Dr. Nesbitt. He testified that:

> in his view the asthma attack experienced by plaintiff in 1951 was precipitated by the penicillin injections given to him at that time; that plaintiff's intrinsic asthma evidenced itself following repeated respiratory infections and said penicillin reaction; that the symptoms later appearing during the period he treated plaintiff were substantially the same as those that occurred in 1951, and were "classic examples of manifestations of intrinsic asthma"; that intrinsic asthma is a permanent condition that is usually slowly progressive and causes organic changes which result in emphysema; and that in plaintiff's case his intrinsic asthma progressed to the point that he developed emphysema. Dr. Nesbitt stated that emphysema is a very slow developing malady that often follows repeated attacks of asthma; and he described this disease as a "structural change in the chest which results from obstructed breathing, causing the development of a barrel chest . . . increased resonance to percussion, and shortness of breath, because the lungs are expanded to the point where you don't have the inflow and outflow of air that the normal person has". Dr. Nesbitt stated that emphysema is a progressive and incurable disease. Dr. Nesbitt also stated that it would be difficult to establish the time when plaintiff's bronchial asthma progressed to the state that it developed into emphysema, but that such

condition would have become well advanced before it was physically obvious.

Dr. Nesbitt, who has served as a medical member of Naval Boards of Medical Survey, expressed the opinion that plaintiff was physically unfit for full military duty at the time of his release from active military service in April 1952; that there was sufficient evidence available at that time by way of history furnished by plaintiff and official documentary medical history to have enabled him to find that plaintiff was disabled in 1952; and that while, in his opinion, plaintiff's emphysema condition was not advanced in April 1952 to the stage that it would have been disqualifying at that time, his asthma condition in 1952 was such that he was then disqualified physically from performing full active military service. [Fdg. 27 Slip Op. pp. 30-31].

However, the Court of Claims rejected Dr. Nesbitt's testimony because:

> it is quite clear . . . that he made a *retrospective* diagnosis of plaintiff's condition at the time of his separation based upon medical history furnished by plaintiff relating to periods prior and *subsequent to* his *separation* . . . which were not *before* medical authorities who examined plaintiff on April 21, 1952 . . . [Fdg. 31(c) Slip Op. p. 34; emphasis supplied].

The Court of Claims concluded that because (a) the official medical records of petitioner's history containing the Tokyo and Guam attacks were not available to the examining physician; (b) petitioner's failure to advise the examining physician of his recent attack while enroute to Wright-Patterson AFB; (c) Petitioner did not realize the seriousness of his condition and (d) Petitioner's bronchial asthma was in a state of remission, the examining physicians were justified in finding that petitioner was fit to perform military duties. (Slip. Op. pp. 5-6; Fdg. 31(b) Slip Op. pp. 33-34).

As we have shown above the issue is not whether the examining physicians acted reasonably at the time of release, but rather whether subsequent medical history demonstrates the mistaken diagnosis and discloses the true nature and extent of petitioner's condition at the time of release. (*Walters* v. *United States, supra* and cases cited therein). Moreover, the fact that petitioner was unaware of the seriousness of his condition, his failure to request a more thorough examination, the fact that the examining physicians did not have all the records, or that petitioner's condition was in a state of remission are not controlling factors in the determination. *Grubin* v. *United States, supra,* at 277-78, 333 F.2d at 863; *Powers* v. *United States, supra,* Slip Op. p. 12, *Smith* v. *United States, supra.*

Petitioner respectfully submits that the rejection of Dr. Nesbitt's unrebutted testimony on the grounds that it was partially based on subsequent medical history and the adoption of a standard to test unfitness for duty which only looks to the reasonableness of the examining physicians actions at the time of release constitutes fatal flaws in the Court of Claims' decision requiring rehearing.

B.

The Evidentiary Support Upon Which the Board and the Court of Claims Predicated Their Finding Lacks Substantial Weight

Petitioner was not given a formal hearing before the Board on the grounds that he had failed to submit sufficient evidence to establish a showing of "probably error or injustice". The Board's action was presumably based on a memorandum from the Surgeon General which advised that "no change in the record is believed indicated and none is recommended". The Surgeon General's recommendation primarily rested on the ground that "an examination dated 21 April 1952 considered him qualified

for service". Thus, the Board's decision rested solely, as must the Trial Commissioner's ultimate finding which was adopted by the Court, on the determination made at time of separation. It is true that this would seem to provide an adequate basis for the Board's decision. However, "the fact that there is evidence, considered of and by itself, to support the administrative decision is not sufficient where there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole". *Williams* v. *United States*, 130 Ct.Cl. 435, 441, 127 F.Supp.

The only evidence which could possible lend support to the Board's and the Court of Claims' ultimate finding was more than adequately rebutted by petitioner's presentation before the Board and the Court. Under these circumstances petitioner respectfully submits that the Board acted arbitrarily and without substantial evidentiary support and that the Court's affirmance of the Board's action is contrary to law.

C.

Petitioner's Intrinsic Asthmatic Condition Permanently Disabled Him as of April 1952 From Performing Full Military Duty

Petitioner's respiratory ailments were officially recognized by the Air Force as enough for retirement, if present in an adequate degree. A regulation on standards for new commissions indicated that a

> (1) History of any of the following: . . . 8 asthma of *any degree* or a history of asthma, except a history of childhood asthma with a trustworthy history of complete freedom from symptoms since twelfth birthday [Emphasis supplied].

would be cause for rejection of new applicants.[2] That

[2] AFM 160-1, 1 September 1951 par. 58(a)(1)(8).

procurement standard would not apply in full force to the different issue of retention on active duty or retirement for physical disability (*Towell* v. *United States*, 150 Ct. Cl. 422, 434-436 (1960)), but an Air Force retirement regulation did require that due regard be given to the specific procurement regulations which were not to be as strictly interpreted as for appointment on active duty.[3] "This means, at least, that . . . [petitioner's asthmatic condition] would be the foundation for disability retirement if permanent and sufficiently severe." (*Grubin* v. *United States*, *supra* at 864). We respectfully submit that all the evidence in this case brings petitioner's case within this measure.

The Court has found that petitioner on April 29, 1952 had intrinsic asthma. (Slip Op. p. 5). The uncontradicted testimony shows that on February 24, 1952, petitioner suffered an attack which was diagnosed as "acute exacerbation of chronic bronchial asthma". (Fdg. 6 Slip Op. pp. 12-13). Admittedly on April 21, 1952—the date of the physical examination incident to his separation—petitioner was not suffering an attack of asthma. However, in the light of petitioner's subsequent history and the uncontradicated expert testimony on the cyclical nature of intrinsic asthma (although it is a permanent condition), it is plain that the examining physician was wrong in finding that his condition was not incapacitating. There might have been a quiescent period on the day of his physical examination, but the disease was still there. After leaving the service, his condition grew progressively worse to the point that he developed emphysema.

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[3] AFM 160-1, 1 September 1951 par. 1(b)(7).

D.

The Court of Claims' Legal Conclusion Is Premised Upon a Mistake of Material Fact

At Page 5 of the Slip opinion, the Court of Claims states in relevant part as follows:

> "The Correction Board upon advice from the Surgeon General found that the conditions which existed at the time of separation were not of sufficient severity to warrant a finding of permanent incapacity and disability retirement. Plaintiff was so advised on October 2, 1959" . . . "We hold that plaintiff in the case at bar has not shown such determination to be arbitrary and capricious or not supported by substantial evidence".

The record in this case shows that the Correction Board made no findings of fact. The only statements remotely resembling findings of fact, susceptible to judicial review, is the memorandum of September 24, 1959, stating that the Board determined "that no corrective action was indicated", and "that the applicant and counsel have been notified of the action of the board" (JX 1). There is also a letter from the Correction Board to Colonel Hoffman, dated October 2, 1959, reciting in relevant part as follows:

> "I regret to advise you that a careful consideration by the Board of your Military Records, together with such facts as have been provided by you, fails to establish a showing of probable error or injustice in your case" . . .

Nowhere did the Board find, as mistakenly found by the Court of Claims, that:

> . . . "the conditions which existed at the time of separation were not of sufficient severity to warrant a finding of permanent incapacity and disability retirement".

The Correction Board having made no such findings, petitioner was not obliged to allege and prove that this finding was arbitrary and capricious or not supported by the evidence. Therefore this cause should be reversed, based on the mistaken assumption of fact and errors of law by the Court of Claims. Valid findings of fact by an administrative agency are entitled to great weight in a judicial forum. The Court of Claims gave great weight to non-existent findings, and concluded that plaintiff had not shown that the non-existent findings were arbitrary and capricious or not supported by the evidence.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1967

I hereby certify that two copies of the foregoing Petition have been mailed to:

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